Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM POPELKA, GARY MUELLER,

and DON ANDERSON,

Petitioners,

v.

ERIC LEE AND THE GENERAL SERVICES ADMINISTRATION

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM POPELKA; GARY MUELLER, DON ANDERSON	) No. 92-36700) 92-36701)DC No. CV-92-) 48-JDS
Plaintiffs-Appellants,	)
v.	)
JIM O'KEEFE; UNITED STATES GENERAL SERVICE ADMINISTRATION	) MEMORANDUM*
Defendants-Appellees.	)

Appeal from the United States District Court for the District of Montana
Jack D. Shanstrom, District Judge Presiding

Submitted February 2, 1994**
[Filed February 11, 1994]
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

Before: WRIGHT, REAVLEY,*** and LEAVY, Circuit Judges.

Appellants (the custodians) claim that the General Services Administration (GSA) and one of its regional administrators misled them in the course of their employment with the Government, and terminated their employment in violation of their constitutional rights. They brought this action in federal district court, seeking mandamus, injunctive and monetary relief. The complaint does not assert claims under a federal statute which expressly creates a private cause of action for federal employees who have an employment dispute with the Government. Instead, the claims can be characterized as Bivens-type constitutional claims. We agree with the district court that such claims are not cognizable in federal district court in light of the Civil Service Reform Act (CSRA).

*** Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

This court has consistently held that federal civil service employment disputes cannot be brought originally in federal district court, but must instead be resolved under the comprehensive administrative scheme created by the CSRA. "Congress' purpose in enacting the CSRA was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies, subject to judicial review." Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991). We have held that the CSRA has provisions designed to protect civil servants from personnel practices which contravene their constitutional rights, and that Bivens-type claims asserting constitutional violations cannot be brought by federal employees in federal district court. Karamanos v. Egger, 882 F.2d 447, 451-53 (9th Cir. 1989)(holding that claim of improper job classification seeking mandamus and other relief precluded by CSRA); Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989)(holding that Bivens claim brought by probationary employee and alleging that demotion violated

privacy and free speech rights precluded by CSRA); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984)(noting that "other circuits have held that the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all" and holding that "the federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere."). Recognition of congressional intent to create a uniform, balanced administrative scheme for review of federal personnel actions compels the conclusion that the CSRA precludes such federal district court actions, whether or not the CSRA provides the remedy sought by the federal employee. United States v. Fausto, 484 U.S. 439, 448, 455 (1988); Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991)(holding that "the CSRA precludes even those Bivens claims for which the act prescribes no alternative remedy.").

The GSA classified the custodians as temporary employees. The rights of temporary employees are limited under the CSRA.[1] Nevertheless, such employees are covered by the CSRA and are afforded some rights to challenge personnel actions.[2] Based on the authorities

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1 Chapter 43 of the CSRA covers agency action against civil servants based on unacceptable job performance. An agency can terminate or reduce in grade a civil servant under this Chapter provided that certain notice and hearing procedures are followed, and the employee has a right to appeal the agency decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. § 4303. However, this chapter excludes employees serving under temporary appointments. Id. § 4303(f)(2). Chapter 75 covers suspensions, terminations and other adverse actions taken against civil servants to "promote the efficiency of the service." Id. §§ 7503(a), 7513(a). Suspensions of 14 days or less must be made in compliance with certain procedural safeguards. Id. § 7503. More serious personnel actions, including terminations, may be appealed to the MSPB. Id. § 7513(d). Chapter 75 does not apply to temporary employees. Id. §§ 7501(1), 7511(a)(1)(A)(ii).

2 Temporary employees are covered by Chapter 23 of the CSRA. Chapter 23 forbids "prohibited personnel practices." 5 U.S.C. § 2302(a)(1). Such practices include "personnel action" in violation of any law, rule or regulation directly concerning the "merit system principles." Id. § 2302(b)(11). "Personnel action" includes any personnel action with respect to an employee in or applicant for a "covered position." Id. § 2302(a) (2)(A). A covered position includes any position in the "competitive service." Id. § 2302(a)(2)(B). The "competitive service" includes all employees in the civil service except for certain excepted employees such as those requiring Senate confirmation. Id. § 2102. The "merit system principles" are an extremely broad set of principles.

cited above, the custodians' claims cannot be brought in federal district court and were properly dismissed. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989)(en banc), cert. denied, 498 U.S. 957 (1990), is distinguishable because that case involved a plaintiff who was a member of the armed forces, which is excluded entirely from the CSRA. See 5 U.S.C. § 2101 (defining civil service).

AFFIRMED

They include the principles that "[a]ll employees and applicants for employment should receive fair and equitable treatment . . . with proper regard for their privacy and constitutional rights," that "[e]qual pay should be provided for equal value," that "[e]mployees should be retained on the basis of the adequacy of their performance," and that employees should be protected from "arbitrary action." Id. § 2301(b)(2),(3),(6),(8). The Office of Special Counsel (OSC) is directed to receive and investigate allegations of prohibited personnel practices. Id. § 1214(a)(1)(A). The OSC is authorized to bring actions before the MSPB to correct prohibited personnel practices. Id. § 1214(b)(2)(B).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

WILLIAM POPELKA, GARY MUELLER, and DON ANDERSON,	) Cause No.) CV 92-48-BLG-JDS
Plaintiffs,	)
vs.	)
ERIC LEE and THE GENERAL SERVICES ADMINISTRATION	) MEMORANDUM AND) ORDER
Defendants.	)

Plaintiffs William Popelka, Gary Mueller and Don Anderson move the Court to clarify or modify its March 23, 1992 preliminary injunction. In addition, both parties move for partial summary judgment on the issue of the plaintiffs' job status with defendants Eric Lee and Government Service Administration (collectively GSA). At present, an injunction preserves plaintiffs' employment status quo pending the implementation of administrative remedies.

BACKGROUND

During 1990, GSA hired these three plaintiffs to augment its custodial staff at the federal building in Billings, Montana. For each of the positions filled, GSA replaced a permanent, or permanent appointment, employee. Despite the fact that GSA had a continuing and permanent need for custodial employees to complete the tasks assigned to these plaintiffs, GSA hired them on a seemingly temporary basis. For each employee, GSA filed an SF-50 form setting forth the temporary nature of the appointment. Plaintiffs contend they were never apprised of their temporary status and that it violated several provisions of the Federal Personnel Manual. Nevertheless, shortly before their two-year anniversary date, GSA unceremoniously terminated the plaintiffs' jobs in order to subcontract the labor from an organization hiring only handicapped persons.[1]

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1 Known as the National Industry for the Severely Handicapped Workshop (NISH).

At the original injunction hearing, William Popelka testified that all three plaintiffs were led to believe GSA hired them under the **Veterans' Readjustment Act** (VRA), **38 U.S.C. § 1001 et seq.**, with an opportunity for permanent employment. This understanding was never memorialized in their SF-50 job status forms and GSA contends it never guaranteed any type of permanent employment. The essence of the factual controversy in this case revolves around whether GSA officials represented to the plaintiffs that they had permanent job status. Once a finder-of-fact determines the job status of plaintiffs, it must consider whether plaintiffs were wrongfully terminated.

On May 23, 1992, I issued a preliminary injunction preventing any job status change until plaintiffs had an opportunity to take advantage of administrative remedies. This injunction still controls this case and, in particular, prevents any further personnel action by defendants "until such time as the General Counsel takes action either accepting or denying this case." Order of

March 23, 1992, at 6. GSA recently notified the Court that the General Counsel has reviewed the case and filed an action. GSA now considers the Court's injunction to have lapsed by its own terms.

I predicated the injunction upon two findings: first, the plaintiffs raised serious questions of fact and law on the unfair labor practice and veterans' status issues; and, second, since no administrative process was available, the plaintiffs were threatened with irreparable injury by a complete lack of process or remedy. The General Counsel's recent complaint filed with the Federal Labor-Management Relations Board provides plaintiffs with some administrative process. Plaintiffs argue that this process does not satisfy their claims and leaves them with the continuing threat of irreparable injury.

GSA contends that the General Counsel's complaint changes the underlying jurisdictional basis for this action. Therefore, GSA asks the Court to re-examine its jurisdiction prior to entertaining further injunctive relief or reviewing the merits of the case. GSA argues, in

the alternative, that even should jurisdiction exist, the plaintiffs' claims fail to withstand summary judgment.

In their amended complaint, plaintiffs reiterate their requests for injunctive and mandamus relief, renew their due process challenge to the termination and add a claim of wrongful termination under the VRA. Their wrongful termination claim includes a prayer for declaratory relief. In their motion for partial summary judgment, plaintiffs request a declaration that they are VRA employees and that they are entitled to all of the benefits and protections afforded by the VRA and other applicable laws.

DISCUSSION

Both parties acknowledge that plaintiffs will have some cause of action at the administrative level. The General Counsel to the Federal Labor-Management Relations Board (FLRB) has filed a Federal Labor-Mangement Relations Act (FLRA) claim on behalf of plaintiffs, their union and other similarly situated

custodians. The complaint alleges an unfair labor practice pursuant to 5 U.S.C. § 7118.

Plaintiffs argue, however, that since this forum will not address their individual job status claims as VRA permanent appointees, this Court must retain jurisdiction of the case and issue a declaratory order deciding the job status issue. While GSA seems to concede plaintiffs' point that the FLRB will not address job status, it argues that the threshold issue of job classification is one properly decided by the Merit Systems Protection Board (MSPB), which has jurisdiction over "prohibited personnel action[s]" as defined in 5 U.S.C. § 2302. See, e.g., Houlihan v. Office of Personnel Management, 909 F.2d 383 (9th Cir. 1990). Therefore, GSA argues that Congress has removed this Court's jurisdiction because these statues provide a comprehensive remedy for all personnel action claims against federal agencies.

The MSPB serves as an important remedial cog in the **Civil Service Reform Act** (CSRA), **5 U.S.C. § 1101 et seq.** The Merit System ensures that federal employees

receive fair and equitable treatment "with proper regard for their privacy and constitutional rights," **5 U.S.C. 2301(b)(2)**, without being subject to arbitrary action and personal favoritism. **5 U.S.C. § 2301(b)(8)(A)**. It also ensures that "[e]mployees should be retained on the basis of the adequacy of their performance . . . ." **5 U.S.C. § 2301(b)(6)**.

To initiate a claim under the Act, an aggrieved employee must first present allegations of a "prohibited personnel practice" claim to the Office of Special Counsel. **5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A)**. Pursuant to statute and regulation, the Special Counsel must review the allegations and decide whether to proceed with an action before the MSPB. **5 U.S.C. § 1212(a)(2)(A), 1214(b)**. There are limited instances where an employee may place a claim before the MSPB without proceeding through the Office of Special Counsel. For instance, plaintiffs, as permanent VRA employees, may also file a direct appeal with the MSPB as veterans pursuant to **5 U.S.C. § 7511(a)(1)(B)**.

Plaintiffs contend that these administrative avenues will not completely protect their rights as permanent VRA appointees. They cite several cases indicating that MSPB has no jurisdiction to hear the job status complaints of temporary employees. See Cinnamon v. FAA, 10 M.S.P.R. 598, 600 (1982); Hunter v. Dep't of Army, 40 M.S.P.R. 449 (1989). Plaintiffs urge this Court to hear their claims and resolve the job status issue. They rely upon dicta in Bush v. Lucas, 462 U.S. 367, stating that a **Bivens**-type claim may lie where an employee's injury is not attributable to a personnel action which may be remedied under the federal statutory scheme. Id. at 391 (Marshall, J. concurring).

Plaintiffs also rely on case law allowing a cause of action for promissory estoppel against the government. In Beacom v. Equal Employment Opp. Comm'n, 500 F.Supp. 428 (D. Ariz. 1980), the district court allowed an attorney to sue for permanent injunctive relief on the theory of estoppel. The government breached oral and written promises to appoint plaintiff to permanent service

with the government. Only after plaintiff abandoned his long-standing law practice did the government decide to breach. The court found that the government may be subject to estoppel if its actions amounted to "affirmative misconduct." Id. at 436. The court reinstated the attorney to his permanent position. Id. at 438-9.

Despite these authorities, however, plaintiffs here have remedies available through the administrative process. Even when considered temporary employees, they may file an original action with the Office of Special Counsel pursuant to **5 U.S.C. § 2302(a)(2)(B)**. This type of original action jurisdiction requires only that they present a question defined as a "prohibited personnel practice." **5 U.S.C. § 2302(a)**. Should the Special Counsel find that the complaint contains meritorious claims, it will be reviewed by the MSPB. **5 U.S.C. § 1212(a)(2)(A), 1214(b)**. Furthermore, if plaintiffs take a direct employee appeal under the VRA, any resulting final order, even one dismissing the case for lack of jurisdiction, is subject to judicial review in the circuit

court. Maddox v. Merit Systems Protection Board, 759 F.2d 9, 10 (D.C. Cir. 1985).

Although plaintiffs complain they are not guaranteed a forum for the issues raised in the complaint, this Court's jurisdiction does not hinge upon an exhaustive analysis of what claims might be received by the MSPB. Instead, district court jurisdiction depends upon the intent of Congress in establishing the civil service administrative appeals system.

The existence of district court jurisdiction in the government employment context was reviewed by the Ninth Circuit Court of Appeals in Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989), where plaintiff sued the government and his supervisors for demoting him from a probationary superior position. The Ninth Circuit Court of Appeals held that although the **Civil Service Reform Act** provided inadequate relief, the district court had no jurisdiction to supply a court-imposed remedy based upon Bivens v. Six Unknown Named Agents of the

Fed. Narcotics Bureau, 403 U.S. 388 (1971). The Court stated:

> Because Congress provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provide damages, or complete relief, was "inadvertent." As a result, this court cannot imply a **Bivens** remedy.

This reluctance to allow district court jurisdiction to contravene the CSRA applies broadly to various forms of government employment issues. In Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991), a VA doctor had his surgical privileges revoked and was allegedly driven from his job. The court noted that Congress has established a statutory scheme to handle VA personnel grievances. It held that "where Congress has provided some mechanism for relief, **Bivens** claims are precluded." Id. at 313 (citations omitted). The court declined to "upset the balance of interests struck by Congress" where the statutory system provided a "measure of relief." Id. at 314. The court held, "Although these remedies [under the

statutory scheme] do not guarantee full and independent compensation for constitutional violations . . . , they do indicate a Congressionally-authorized and comprehensive remedial scheme sufficient to preclude additional forms of relief." Id. at 315.

The court reaffirmed this holding in Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991) and, in doing so, stated:

> The CSRA's comprehensive remedial provisions convince us that there was no inadvertence by Congress in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights.

It added that the CSRA also preempts common law tort claims because Congress "left no room for them to operate." Id. at 843.

Plaintiffs raise a number of serious issues concerning their initial job status and GSA's attempt to terminate them. But this conclusion in itself cannot suffice as a source of jurisdiction. Congress has broadly

legislated this case and others like it into a comprehensive system of administrative review. I have no indication from any recent case law that Congresss created a job status exception to the CSRA administrative review system. On the other hand, the CSRA provides for administrative review of "prohibited personnel actions," which include appointment and removal decisions. **5 U.S.C. § 2302(a)(2)(A)**.

Plaintiffs may file a direct appeal of GSA's termination decision or they may avail themselves of the Office of Special Counsel, which may, in turn, file an action with the MSPB. The mere availability of these CSRA remedies serves as a "special factor counseling against recognition of a **Bivens** remedy for [plaintiffs]." Saul, 928 F.2d at 840. These same factors counsel against district court review of the estoppel claims. Estoppel claims against the government are subject to significant restrictions that do not apply in actions against private parties. See e.g., Heckler v. Community Health Services, 467 U.S. 51 (1984); Schweiker v. Hansen, 450

U.S. 380 (1947). By enacting the CSRA's comprehensive system of administrative review, Congress weighed the appropriate limitations upon promissory estoppel claims raised in employment appointment and hiring decisions. See Saul, 928 F.2d at 840, 843. To the extent that this cause of action is not available at the administrative level, it is preempted.

Based on the foregoing,

IT IS ORDERED that defendants' motion to dismiss on the basis of lack of jurisdiction is granted. **The Civil Service Reform Act** preempts all causes of action embodied in Counts I and II of the Amended Complaint. Therefore, plaintiffs' requests for mandamus relief, further injunctive relief, declaratory judgment, and compensatory damages are denied.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

DONE and **DATED** this 18th day of June, 1992.

Jack Shanstrom
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

WILLIAM POPELKA, GARY MUELLER and DON ANDERSON,	) Cause No.) CV 92-48-BLG-) JDS
Plaintiffs,	)
vs.	) **O R D E R**
ERIC LEE and the GENERAL SERVICES ADMINISTRATION,	)
Defendants.	)

Plaintiffs in the above-entitled litigation seek relief, pursuant to **Fed.R.Civ.P. Rule 60(b)**, from this Court's previous order of June 18, 1992. Upon careful review of the briefs and submitted documents, I am prepared to rule.

Plaintiffs argue that administrative remedies are non-existent, thus leaving this Court with no choice but to retain jurisdiction in order to avoid injustice. Such argument is based on a filed affidavit alluding to one administrative agency's inability to hear the case. Such

argument is further supported by copies of filed administrative claims.

Plaintiffs' assumptions regarding the "probable outcome" of the administrative claim does not affect this Court's previous order. Despite plaintiffs' assertions, all of the Court's original considerations concerning Congressional intent remain intact.

The jurisdiction vested in this Court is not dependent upon an analysis of the various administrative options that may or may not be available to plaintiffs. On the contrary, as stated in this Court's order of June 18, 1992, jurisdiction is founded upon Congressional intent in establishing the civil service administrative appeals system. This Court does not interpret Congressional intent as providing for jurisdiction in this case, in the face of the Congressionally created CSRA. See, generally, **Saul v. United States**, 928 F.2d 829 (9th Cir. 1991).

The assertion by plaintiffs that their proposed administrative claims may be unsuccessful does not permit this Court to contradict Congressional intent and entertain

jurisdiction. Plaintiffs simply have not provided the Court with any substantial or compelling reason to provide relief in accordance with **Rule 60(b)**.

Accordingly,

IT IS ORDERED that plaintiffs' motion for relief from the Court's June 18, 1992 order is denied.

DONE and **DATED** this 26th day of August, 1992.

Jack D. Shanstrom
United States District Judge

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DONALD G. ANDERSON, WILLIAM K. POPELKA, GARY R. MUELLER, Appellants,	) DOCKET NUMBERS)) DE3443920451-I-1) DE3443920450-I-1) DE3443920452-I-1
v.	) DATE: Jan 29, 1993
GENERAL SERVICES ADMINISTRATION, Agency.	)

Harry L. Dawson, American Federation of Government Employees, Fort Worth, Texas, for the appellants.

John M. Hewins, Esquire, Denver, Colorado, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellants have petitioned for review of an initial decision dismissing their appeals for lack of jurisdiction. For the reasons discussed below, we DENY

the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeals on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still dismissing the appeals.

BACKGROUND

The appellants, who were separated from positions in the competitive service, filed individual appeals of their separations. *See, e.g.*, Initial Appeal File (IAF) (*Anderson*), Tab 1; IAF, Tab 12, Subtabs 1-6. After providing them with an opportunity to show that the Board had jurisdiction over the appeals, and after consolidating the appeals, the administrative judge issued an initial decision dismissing the consolidated appeals as outside the Board's jurisdiction. *See, e.g.*, IAF (*Anderson*), Tabs 2, 7; IAF, Tab 13 (Initial Decision). In their petition for review, the appellants allege that the administrative judge erred in finding that the Board lacked jurisdiction over their appeals.

ANALYSIS

The administrative judge's finding that the Board lacked jurisdiction over the appellants' appeals appears to have been based on his belief that the Board lacked jurisdiction over any termination of a temporary appointment. *See* Initial Decision at 3 ("[t]he Board has long held that it is without jurisdiction to adjudicate the termination of a temporary term limited appointment"). We know of no basis for such a broad holding. While one of the decisions on which the administrative judge relied supports the proposition that a separation on the expiration date of an appointment does not constitute a removal appealable to the Board, *Soehngen v. Department of Justice*, 47 M.S.P.R. 169, 172 (1991),[1] that decision does not indicate that a separation before that date may not be appealed under any circumstances.[2]

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1 The other decision on which the administrative judge relied, *Dubose v. United States Postal Service*, 45 M.S.P.R. 252 (1990), concerns Board jurisdiction over agency denials of requests for the restoration of partially recovered employees. We see nothing in that decision that is relevant to this appeal.

2 An authority cited in that decision indicates that the reason a separation on the expiration of an appointment is not

For the reasons stated below, however, we concur in the administrative judge's conclusion that the Board lacks jurisdiction over the appellants' appeals.

First, we note that, under 5 U.S.C. §§ 7512(1) and 7513(d), the Board has jurisdiction over an appeal from the removal of an "employee," as that term is defined at 5 U.S.C. § 7511(a)(1). An individual in the competitive service is an "employee" if (1) he is not serving a probationary or trial period under an initial appointment and (2) he has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A).

The appellants were employed in the competitive service, *see* IAF, Tab 12, Subtabs 1-6, and there is no indication in the record that any of them was serving a probationary or trial period at the time of his separation.

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appealable is that the separation simply carries out the terms of the appointment. *See Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199-200 (1980), cited in *Soehngen*, 47 M.S.P.R. at 172.

Furthermore, the record indicates that each appellant had been continuously employed by the agency for more than a year when he was separated. *See* IAF, Tab 12, Subtabs 1-6. None of the appellants, however, has shown that he had a year of current continuous service other than service under a temporary appointment limited to a year or less. The service of appellant Anderson appears to have been performed entirely under two temporary appointments, each of them limited to 1 year, *see id.*, Subtabs 1, 2, 8, 11; and, except for a period lasting well under a year, the service of the other two appellants was performed under two temporary appointments, each of them limited to 1 year, *see id.*, Subtabs 3-6, 9, 10, 12, 13.[3] We therefore

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3 The record indicates that appellants Popelka and Mueller, each of whom received a 1990 appointment and a 1991 appointment, *see* IAF, Tab 12, Subtabs 3-6, were separated after the expiration dates of their 1991 appointments, *see id.*, Subtabs 4, 5, 9, 10, 12, 13. The absence of the usual forms documenting their employment immediately before their separations apparently is the result of a delay in their separations that was caused by a preliminary injunction granted by a U.S. district court at the appellants' request; the court dissolved the injunction less than 3 months later; shortly before the separations were effected. *See, e.g.*, IAF (*Popelka*), Tab 1 (court decision). Because the appellants were separated less than a year after their 1991 appointments

find that the appellants have failed to show that they met the definition of "employee" described above. *See Fish v. Department of the Navy*, 29 M.S.P.R. 595, 598 (1986).

In their petition for review, the appellants seem to allege that statements the agency made during a court proceeding concerning their separations are inconsistent with a finding that the Board lacks jurisdiction over their appeals.[4] Even if the agency stated or suggested that the Board would have jurisdiction over these appeals, however, such a statement or suggestion would not confer jurisdiction on the Board. *See Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 686 (1991).

The appellants also seem to be renewing their argument that the agency misled them into believing that

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expired, and because there is no evidence of any other employment that could be counted toward the year of current continuous service required under 5 U.S.C. § 7511(a)(1)(A)(ii), we need not determine whether service performed after the expiration of the 1991 appointments can be considered service under other than a temporary appointment limited to 1 year or less.

4 *See supra* at 4 n.3. After dissolving its preliminary injunction, the court dismissed the appellants' petition for judicial review. *See, e.g.*, IAF (*Popelka*), Tab 1.

their appointments would become permanent and that they had been appointed under the Veterans Readjustment Act. We note, however, that the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by statute or regulation. *See Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588 (1989). In the absence of evidence showing that the appellants met the criteria of 5 U.S.C. § 7511(a)(1)(A), we find that the Board has no jurisdiction over these appeals. *See* 5 C.F.R. § 1201.56(a)(2)(i) (an appellant has the burden of proving that the Board has jurisdiction over his appeal); *cf. Julius v. Department of the Army*, 35 M.S.P.R. 130, 133 (1987)(in the absence of an authorized appointment, an employee has no rights beyond those incident to the position to which he or she is officially appointed), *aff'd*, 852 F.2d 1293 (Fed.Cir. 1988)(Table).

Finally, because the Board has no jurisdiction over these appeals, it has no authority to review either the merits of the appellants' separations or the appellants' allegations of procedural error and prohibited personnel

practices. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982); *see also Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984)(an appellant has a right to a hearing on the merits only after Board jurisdiction has been properly invoked).

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your response to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

United States Court of Appeals for the Federal Circuit

93-3219

DONALD G. ANDERSON, WILLIAM K. POPELKA, and GARY MUELLER,

Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: December 16, 1993

Before RICH, NEWMAN and PLAGER, *Circuit Judges*

PLAGER, *Circuit Judge*.

This is an appeal from a final decision[1] of the Merit Systems Protection Board, dismissing for lack of jurisdiction a petition for review of an agency decision to remove employees. We ***affirm*** the decision of the Board.

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1 In its decision of January 29, 1993, the full Board denied the petition for review, reopened the appeal under its own motion, and affirmed as modified the initial decision of October 1, 1992, Dkt. Nos. DE3443920451-I-1, DE3443920450-I-1, DE3443920452-I-1.

BACKGROUND

Anderson, Popelka, and Mueller were employees of the Government's General Services Administration (Government), custodians of the Federal Building in Billings, Montana. Petitioners are all combat veterans of the Vietnam War, and are eligible for appointment under the Veterans Readjustment Act (VRA). In 1990, petitioners were hired as temporary employees pursuant to 5 C.F.R. § 316.402(b).[2] The term of each appointment was one year. Anderson, Mueller, and Popelka began work on October 9, March 26, and April 30, 1990, respectively. Their appointments were renewed in 1991. Petitioners claim to have thought that their appointments were not "temporary" but were VRA appointments -- after two years of service, a VRA appointee receives a protected position within the competitive system of federal employment. 5 C.F.R. §§ 307.101(e), 315.705(a)(2).

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2 All citations to the Code of Federal Regulations are to the 1993 edition. All citations to the U.S. Code are to the 1988 edition.

By memorandum dated January 22, 1992, petitioners were notified that they would be terminated effective February 28, 1992. Upon learning of their proposed termination, petitioners sought and received a temporary restraining order in United States District Court for the District of Montana staying their removal. The Government moved to dismiss based on lack of jurisdiction. In granting the motion to dismiss and lifting the order, the district court cited the Merit Systems Protection Board (MSPB or Board) as the appropriate forum for petitioners' complaints.[3]

Petitioners were terminated June 27, 1992. Petitioners then sought review by the MSPB. The Government again moved to dismiss for lack of jurisdiction. In an initial decision dated October 1, 1992, an Administrative Judge (AJ) dismissed the petition for review, ruling that the MSPB had no jurisdiction over termination of temporary term-limited appointments. In a

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3 The decision of the district court is currently on appeal to the Ninth Circuit.

final decision dated January 9, 1993, the full Board upheld the dismissal. The Board disagreed with the AJ to the extent the AJ had held that the MSPB had no jurisdiction over appeals by temporary employees. The Board held that it had jurisdiction to review agency decisions to terminate "employees" as that term is defined by 5 U.S.C. § 7511(a)(1), which includes certain temporary employees. The Board held that on the facts of this case these petitioners were not employees over whom the MSPB had jurisdiction under the statute. Petitioners appeal to this court.

DISCUSSION

The burden of establishing that the MSPB has jurisdiction over their appeal is upon petitioners. 5 C.F.R. § 1201.56(a)(2)(i). The gravaman of petitioners' appeal to the MSPB is that they understood their appointments to be VRA appointments, and that their positions would become protected positions in the competitive service. Thus they were misled into accepting their appointments as temporary employees.

Section 7513(d) of the U.S. Code Title 5 gives the MSPB subject matter jurisdiction over agency decisions to remove an employee. An "employee" is defined as

> an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment **under other than a temporary appointment limited to 1 year or less**.

5 U.S.C. § 7511(a)(1)(A)(emphasis supplied). Petitioners were hired on a one year temporary basis pursuant to the Code of Federal Regulations:

> (b) *Noncompetitive temporary limited appointments*. An agency may give a **noncompetitive temporary limited appointment** without regard to the existence of an appropriate register to an individual in one of the categories set out below.
>
> . . . .
>
> (4) Any veteran who meets the qualifications for a veterans readjustment appointment is eligible for employment under this paragraph.

5 C.F.R. § 316.402 (emphasis supplied).

Petitioners were aware of the temporary character of their appointments. The SF-50 forms with which they were hired plainly stated that the positions they held were temporary. Petitioners also must have known that they were receiving fewer benefits, notably health care, than employees in the competitive service.

Petitioners do not deny that they were employed as temporary employees with one year appointments, but contend that the Government's misconduct in appointing them estops the Government from denying that they are protected employees within the competitive service. In essence, petitioners contend that they are employees in the competitive service by judicial construction, and therefore that the MSPB has subject matter jurisdiction over the decision to terminate them.

Petitioners argue that the MSPB is authorized to examine the Government's determination of employee status. In ***Grigsby v. United States Dep't of Commerce***, 729 F.2d 772 (Fed. Cir. 1984), the official record of

employment, the SF-50, establishing Grigsby's status was wrong due to a clerical error. This court held that the appointment paper is "not a legally operative document controlling on its face an employee's status and rights." *Id.* at 776. In that case, the Government was able to show that Grigsby did not have the employment status indicated by the form.

In this case, petitioners use *Grigsby* to argue that the employment status shown on their SF-50 forms does not preclude their equitable estoppel argument. In *Grigsby*, however, the SF-50 did not accurately reflect the Government's intention with regard to employment status. Here, it is conceded, the Government's intention is accurately reflected in the SF-50; it is the propriety of the Government's intention that is at issue, not the correctness of the record of its intention.

Petitioners present no evidence that the form was incorrect, and that they are not in fact temporary appointees. In making their estoppel argument, petitioners assert just the opposite: that although appointed

as temporary employees, their status was based on Government deception. Petitioners in effect argue that, while facially accurate, the SF-50 form is not legally controlling, leaving the MSPB, or this court, free to invent theories of jurisdiction. Even if the petitioners' argument from ***Grigsby*** were accepted, it provides no affirmative support for petitioners' basic contention that MSPB jurisdiction may be derived from Government misconduct in the initial employment decision.

Petitioners quote a plethora of cases to show that the doctrine of equitable estoppel applies to the Government. Although estoppel is often mentioned in dicta, the cases that actually estop the Government are few and far between. Petitioners' best case, ***Watkins v. United States Army***, 875 F.2d 699 (9th Cir. 1989), concerned the employment status of a homosexual soldier in the U.S. Army. The court's jurisdiction to hear Watkins's case, however, was not based on his employment status. Nor was Watkins's standing to sue at issue. In short, Watkins had an authoritative forum in

which he could argue the doctrine of estoppel. In the present case, in contrast to ***Watkins***, it is precisely these threshold requirements of jurisdiction and standing that are contested, and that petitioners seek to satisfy through estoppel arguments. Petitioners place the cart before the horse. Estoppel requires a forum; it cannot be used to build a forum.[4]

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[4] Petitioners' case is readily distinguished from cases in which an employee resigns from a protected position in the competitive service but later alleges the resignation was involuntary. Although as a general proposition resignation is presumed to be voluntary, and the MSPB has no authority to review loss of employment due to voluntary resignation, ***Schultz v. United States Navy***, 810 F.2d 1113, 1135-36 (Fed.Cir. 1987)(citation omitted), "[i]f however, the employee can demonstrate that the resignation was involuntary, then it must be treated as an adverse action, which invokes the [Civil Service Reform] Act, allowing the employee to appeal to the Board (and ordinarily entitling him to reinstatement and back pay)." ***Latham v. United States Postal Serv.***, 909 F.2d 500, 502 (Fed. Cir. 1990) (citation omitted). ***See also Scharf v. Dep't of the Air Force***, 710 F.2d 1572, 1574 (Fed. Cir. 1983); ***Burgess v. Merit Sys. Protection Bd.***, 758 F.2d 641, 643 (1985) "an involuntary resignation is a removal." Thus, an employee in the competitive service who is found to have involuntarily resigned from a protected position has a right to MSPB review under 5 U.S.C. §§ 7512(1), 7513(d) (1988). This court has held, in short, that involuntary resignation is removal, and removal does not strip an employee of the right to MSPB review of the decision to terminate. ***See Covington v. Dep't of Health & Human Servs.***, 750 F.2d 937, 944 (1984). In this case, in contrast, the Government took actions allegedly adverse to job applicants, persons who did

It is important to understand what is at issue here. The question before us is not whether the Government behaved in a way that entitles these petitioners to redress: the question is only whether, if redress is to be sought, Congress has authorized the MPSB to provide it. Petitioners seek MSPB review of an agency action that they concede is unreviewable by the MSPB on a plain reading of the statute. For this court to hold for petitioners would improperly broaden the scope of MSPB authority to include equitable review of agency appointment processes.

At the district court, petitioners were dismissed for lack of jurisdiction in view of their failure to exhaust their administrative remedies. The district court reasoned that congress provided a comprehensive scheme of administrative review of agency employment policy under the Civil Service Reform Act of 1978, and concluded that it was inappropriate for the district court to interfere.

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not, prior to the alleged adverse action, hold a protected position in the competitive service.

This court affirms the MSPB ruling that it has no jurisdiction over the claims of these petitioners.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

AFFIRMED.